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No.

IN THE

Supreme Court of the United States

October Term, 1980

JOSEPH CONFORTE and SALLY CONFORTE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

QUESTIONS PRESENTED

1. Whether, in view of the declaration in the Judicial Conference's Code of Judicial Conduct that, "to the extent that any part of the enumerated statutes or Conference action is less restrictive than the Code, the latter will control", and the statement under Canon 3 that "a remittal of disqualification is not permitted under any circumstances", it was lawful for the courts below to spell out a waiver of the trial judge's apparent bias and prejudice after it had been found as a fact that his expressions "do raise reasonable doubts about his impartiality and do create at least an appearance of some bias against the defendant."

2. Whether, assuming that waiver of apparent judicial bias and prejudice under 28 U. S. C. §455(a) is still possible, there was "full disclosure on the record" by the trial judge, as required by 28 U. S. C. §455(e), of his strong negative personal feelings against the petitioner husband, feelings that necessarily vitiated the conviction of his jointly tried co-defendant, the petitioner wife.

3. Whether an absence of actual bias and prejudice on the part of the trial judge was properly found on the basis of the undisputed facts, as distinguished from the should-have-known inferences that were drawn from those undisputed facts by both courts below.

4. Whether judicial bias and prejudice can be asserted under 28 U. S. C. §455 even after an appeal has been taken, without incorporation of the timeliness requirement of 28 U. S. C. §144, as held by three other circuits, and also as twice held by the court below until one day before its opinion in the present case was filed.

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JOSEPH CONFORTE and SALLY CONFORTE, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 29, 1980. (There are no parties to this proceeding other than those named in the caption.)

OPINIONS BELOW.

The opinion of the court below (Appendix A(1), pp. A1-A25) has not yet been reported.* The opinion of Ferguson, D. J., on motion for new trial after remand because of asserted bias and prejudice on the part of the trial judge, Thompson, D. J. (App. A26-A59) is reported at 457 F.Supp. 641.

JURISDICTION.

The opinion of the court below affirming petitioners' convictions (App. B1) was entered on April 29, 1980. A timely petition for rehearing was denied and a suggestion for rehearing in banc was rejected on August 11, 1980 (App. B1). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

STATUTES AND CANONS OF THE CODE OF JUDICIAL CONDUCT INVOLVED.

The statutes and the Canons of the Code of Judicial Conduct involved are set forth at App. D1-D3.

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*As a matter of convenience, all of the Appendices to the present petition have been separately bound; they are cited herein as "App." with appropriate page number.

STATEMENT.

A. Summary of the Proceedings[1]

Petitioners, husband and wife, were indicted in the District of Nevada on a ten-count indictment alleging violation of 26 U. S. C. §7201, attempt to evade and defeat federal employment taxes (App. D2).

Waiving trial by jury, they were tried by Thompson, D. J., and found guilty on four counts. Petitioner Joseph Conforte was sentenced to five years' confinement on each count, the sentences to run consecutively — a total prison term aggregating 20 years — and to pay a fine of $40,000. Petitioner Sally Conforte was sentenced to four years' confinement, which was suspended; to five years' probation, the conditions of which are detailed below, p. 7; and also to pay a fine of $40,000. Both petitioners appealed.

While their appeal was pending in the court below, both filed a motion for new trial under 28 U. S. C. §455, disqualification of justice, judge, or magistrate (App. D1), alleging bias and prejudice on the part of Thompson, D. J., of which they had previously been unaware. The court below then remanded the case to the district court, Ferguson, D. J., of the Central District of California sitting by designation, to hear and determine that motion. Testimony was taken, including the deposition of Thompson, D. J., after which Judge Ferguson denied the motion (App. A26-A59; 457 F.Supp. 641); his grounds for decision are detailed below, pp. 10-12.

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[1]The case was decided below on an unprinted record. Apart from a few undisputed dates from the docket entries, we rely for every statement of fact made herein on the two opinions below (App. A1-A59), which we supplement only with excerpts from the testimony of Thompson, D. J., taken on deposition in connection with petitioners' motion for new trial, and cited herein as "Dep."

On appeal, the court below affirmed the convictions; rejected the claim of bias and prejudice; but set aside as illegal (a) the consecutive sentences imposed on petitioner Joseph Conforte; (b) the terms of probation imposed on petitioner Sally Conforte; and (c) all but one of the fines adjudged against each petitioner. (App. A1-A25.)

In *United States v. Sibla*, decided on March 3, 1980, the court below stated (App. C5) that "Section 455 does not require the filing of an affidavit with the judge, or even a motion for recusal; indeed, the question of recusal under that section may be raised for the first time on appeal." On April 28, 1980, that opinion was amended to strike out the foregoing declaration (*ibid.*); see App. C1-C9 for the *Sibla* opinion before and after amendment.

On the next day, April 29, 1980, the court below held in the present case that applications under 28 U. S. C. §455 were subject to the timeliness provisions of 28 U. S. C. §144 (App. D1-D2), as well as to the general rules governing motions for new trial on the ground of newly discovered evidence (App. A14-A16). A suggestion for rehearing in banc seeking intra-circuit clarification was rejected (App. B2).

The present petition is restricted to questions arising out of the disposition of petitioners' motion for new trial on the ground of bias and prejudice.

B. Instances of Judge Thompson's Asserted Bias and Prejudice.

1. The Bridge Club Letters (App. A34-A36).

Petitioner Joseph Conforte, an avid bridge player (App. A27), late in 1972 applied for membership in the Reno Unit of the American Contract Bridge League (hereafter simply "ACBL"), of which unit Judge Thompson was then president. When that application was received, it was discussed

at length by the unit's board of directors. Women directors objected because the applicant operated a house of prostitution, even though this was a legitimate business in the county where it was located.[2] During the discussion, Judge Thompson informed the board of applicant's felony convictions, for extortion in a Nevada court in 1960, and for a federal income tax violation shortly thereafter (App. A27); at the time of the discussion both convictions were more than ten years old.

"The consensus of the Board was that, if possible, Mr. Conforte's application to the Reno Unit should be rejected. As president, Judge Thompson was asked to write to the national organization for guidance on the procedure and the propriety of declining to accept Mr. Conforte as a member" (App. A34). On February 2, 1973, Judge Thompson wrote the national headquarters of the ACBL; this letter in its entirety appears at App. A35; here are the portions now pertinent:

> "Our by-laws prescribe 'good moral character' as a qualification for membership. The matter has been discussed by the Board of Directors of the Reno Unit and we do not wish to have Mr. Conforte as a member. At least, we do not wish to associate with him. Mr. Conforte has twice been convicted of felonies, extortion and income tax evasion and has served terms in federal and state penitentiaries. He is a notorious bawdy house keeper and is presently engaged in that business in nearby counties. There is nothing wrong or objectionable with his conduct at the bridge table. We understand he desires to participate in ACBL activities,

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[2]Under Nevada law, which provides for the licensing of such places outside of incorporated cities and towns, a house of prostitution no longer constitutes a nuisance *per se*. *Nye County v. Plankinton*, 94 Nev. 739, 587 P.2d 421 (1978).

particularly at regional and national tournaments, and recently played in the Hawaii Regional.

"I suppose there are a good many members floating around in ACBL who would not be acceptable associates for persons with moral scruples, but there is an obvious difference between regular association with an undesirable character in a small local unit and playing bridge against some stranger in a regional or national tournament."

On deposition in June 1978, Judge Thompson testified regarding his use of the word "notorious": "a notorious person is one who is thought of unfavorably" (Dep. 39).

On being advised by the general counsel to the ACBL that rejection of Joseph Conforte's application on the grounds stated appeared appropriate, a majority of the board then voted to deny him membership (App. A35-A36). "Again using his court stationery, Judge Thompson wrote to the defendant informing him of the decision of the Reno Unit and forwarding a check for $3 as a refund of the application fee. The rejection by the bridge club had a profound effect upon Mr. Conforte. He was very upset, and his pride was so hurt that he tore up the check and the letter from Judge Thompson and declined to tell any of his acquaintances about the incident" (App. A36).

2. The Football Cocktail Party (App. A36-A37).

"In the fall of 1973, the University of Nevada-Reno defeated the University of Nevada-Las Vegas in football. After the game there was a cocktail party at the home of one of the Reno assistant coaches who was the son of Judge Thompson's secretary. Judge and Mrs. Thompson attended, together with about fifty other guests. Also at the party was Mr. Roy Woofter who at the time was the district attorney for Clark County (Las Vegas), Nevada, and a good friend of Mr. Conforte. Mr. Woofter was with a group of four

other persons. At the party, a conversation took place between Mr. Woofter and Judge Thompson during which Mr. Conforte's name was mentioned" (App. A36).

The substance of the conversation, as found by the trier of facts on petitioners' motion for new trial, was that while one Scattini, the coach of the Reno team, was good, the team would be better if it had greater financial backing; and Joseph Conforte was mentioned as a possible contributor. Judge Thompson was and is strongly opposed to amateur athletics being supported by anyone in the business of running a house of prostitution (App. A36-A37).

Judge Thompson testified on deposition that he did not remember any discussion concerning coach Scattini or the U. of Nevada-Reno needing money for an athletic program; nor hearing any suggestion that, if money were needed, Joseph Conforte would be a good person to approach for a contribution; nor whether Joseph Conforte's name came into the discussion; nor saying that Joseph Conforte was not good for Reno (Dep. 17-18).

Three witnesses testified that Judge Thompson had said, in substance, "Joe Conforte should be run out of town because he was not good for Reno" (App. A37, note 5). On deposition Judge Thompson testified (Dep. 18, 19), "I don't believe that I would have said that he should be run out of town. * * * I have learned in law school that banishment was not the proper remedy."

On this conflicting testimony, the trier of facts found (App. A37) that, "In response to the comment that Mr. Conforte might contribute to the team, Judge Thompson made a statement to the effect that the only problem with coach Scattini was that he was a good friend of Mr. Conforte and that Mr. Conforte was 'not good for Reno.' "

Judge Ferguson found as a fact, see App. A59, that "it seems clear that Judge Thompson's expressions of his negative feelings about Mr. Conforte at the football cocktail party do raise reasonable doubts about his impartiality and do create at least an appearance of some bias against the defendant." (App. A46.)

3. Remarks During Petitioners' Sentencing (App. A30-A33)

Petitioner Joseph Conforte was sentenced to 20 years' confinement and to pay a $40,000 fine, while petitioner Sally Conforte was sentenced to pay a similar $40,000 fine, and to four years' confinement, suspended, plus five years' probation on condition that she never again file "Sullivan" tax returns — in which, because the taxpayer claims privilege against disclosure, he declares only his net income and tax due based on his own undisclosed computation of net worth, following *United States v. Sullivan*, 274 U.S. 259 (App. A31). As has been noted (*supra*, p. 3), the court below set aside as illegal 15 years of the confinement adjudged against Joseph Conforte, the probation conditions imposed on Sally Conforte, and all but one of the fines imposed on each (App. A21-A25).

Judge Thompson stated frankly that he was imposing sentences that "are unduly harsh and severe" because of his firm conviction that "Sullivan" returns were unlawful, even though he recognized "that these offenses with which these defendants have been convicted are not offenses for willful attempts to defeat and evade income taxes due," and even though he also recognized that, if petitioners were correct in deeming "Sullivan" returns to be lawful, then "if you do have a constitutional right to do that a portion of my sentence is going to be illegal". Judge Thompson took this position because "I do think it is important that we find out in the administration of the tax laws of this

country whether this type of position can properly be taken by taxpayers in the United States''. (App. 32, note.)

The full text of Judge Thompson's remarks during petitioners' sentencing is set forth in note 3 at App. A30-A33.

4. Judge Thompson's Deposition Testimony.

Here will be briefly noted portions of Judge Thompson's deposition testimony relevant to the issue of bias and prejudice, additional to that already adduced under (1) and (2) above.

Called by the prosecution, Judge Thompson testified that (Dep. 5) ''Ever since he [Joseph Conforte] was tried in the Washoe County District Court on either an extortion or blackmail charge — I don't remember exactly the character of the charge — and was convicted and sentenced to the Nevada State Penitentiary, I had the opinion that he was a man of bad moral character, and that was reinforced at the time of his conviction for income tax evasion.''

Judge Thompson further testified (Dep. 18-19), ''I believe that amateur athletics is a very sensitive area, and that it should not in any way become involved with, or supported by, people who are in rackets, so to speak; and at that time Mr. Conforte's business was that type of enterprise, even though it was lawfully conducted. And I think that if there was any discussion about accepting money or financial support from Mr. Conforte, that I would have been opposed to it.''

Judge Thompson testified that, at the time of petitioners' motion to waive a jury, see immediately below, ''My opinion was that I then thought, I still think, that he [Joseph Conforte] is a person of bad moral character'' (Dep. 19-20), an opinion based (Dep. 30) ''Primarily on his criminal record'' — which was also the opinion he held during the trial of the present case (*ibid.*).

Judge Thompson also testified (Dep. 34) that, at the time of the waiver of jury trial, he had never expressed in so many words that he thought that Joseph Conforte was not a person of good moral character, nor had he ever advised Sally Conforte or her attorneys of his opinion that her husband had bad moral character (Dep. 37).

The record shows that petitioners waived jury trial on August 5, 1977. Here is the final question to Judge Thompson on deposition (Dep. 40):

> "Q. Now, with respect to August of 1977, did you realize at that time, sir, that Mr. Conforte's convictions were almost well over ten years old and almost fifteen years old?
>
> "A. Sure. He has never done anything in the meantime to cause me to think that he had revised his activities or general approach to life."

C. Extent of Disclosure of Bias and Prejudice When Petitioners Waived Jury Trial.

The complete colloquy in connection with petitioners' waiver of jury trial appears at App. A28-A30, note 2; the portions presently pertinent are these (App. A29, note):

> "THE COURT: There is something else involved in this waiver of jury trial that should be brought out in the open. I am aware of Mr. Conforte's criminal record. Some years ago I passed upon a post-conviction remedy motion that was filed on behalf of Mr. Conforte. I am aware of two trials in this court which involved Mr. Conforte, one in which I believe he was charged with a violation of the White Slave Traffic Act, and another which involved an effort to abate the operation of the so-called Mustang Ranch for Internal Revenue violations.
>
> "Facts of that nature, if known to a juror prior to impanelment of the jury, would be a basis for dis-

> qualification of a juror. If I am going to be the trier of the facts in this case, I can't eliminate the knowledge I already have. So I want you to know — and you know what I know — that if I am to preside over this trial without a jury, you will have to waive any basis of disqualification because of my prior knowledge of facts concerning Mr. Conforte primarily; I don't know much about Mrs. Conforte."

Judge Ferguson found as a fact that (App. A44), "With respect to the cocktail party statements, it appears from the evidence that the defendants and their counsel were not aware of the facts prior to the trial of this case."

Judge Ferguson further found as a fact (App. A45) that "There is no question that, at the time of their extensive pretrial discussions concerning the advisability of waiving a jury, the defendants' counsel were unaware of the bridge club incident."

But, Judge Ferguson went on to say (*ibid.*), "However, Mr. Conforte was aware of it. He may not have known specifically of the letter which Judge Thompson wrote to the bridge league, but he knew three years before the trial, and vividly remembers it today, that Judge Thompson informed him that he was not wanted as a member of the Reno unit."

D. Bases of the Rulings Below Rejecting Petitioners' Contentions of Bias and Prejudice.

The holdings of Ferguson, D. J., and of the court below on the questions presented by this petition may be summarized as follows:

1. With respect to the contention that the provisions of the Code of Judicial Conduct precluded waiver of the apparent bias and prejudice found to exist, Judge Ferguson held those provisions not governing, and also that they could

not be invoked after conviction (App. A49-A50). The court below made no mention of the Code of Judicial Conduct.

2. With respect to the contention that, if waiver of apparent bias was possible under 28 U. S. C. §455(e) (App. D1), there was no full disclosure here, Judge Ferguson held that Judge Thompson could not have been expected to disclose the cocktail party conversation, which he said he did not remember, and then held that since petitioner Joseph Conforte knew he had been rejected for membership in the Reno unit of which Judge Thompson was president, he must be held to have had knowledge of Judge Thompson's feelings about him, even though (App. A45) "He may not have known specifically of the letter which Judge Thompson wrote to the bridge league."

The court below held (App. A15) that "The rejection letter put Conforte on notice that Judge Thompson had had at least some involvement with the decision to reject his application to the American Contract Bridge League, although concededly Conforte did not know the tenor of the correspondence."

Accordingly, both Judge Ferguson (App. A45-A48) and the court below (App. A20) held that Joseph Conforte had waived any apparent bias and prejudice on the part of Judge Thompson resulting from the bridge club letter.

3. With respect to the contention that, on the undisputed facts, there was actual bias and prejudice on Judge Thompson's part, Judge Ferguson, while finding as a fact that (App. A53) "There is no question that Judge Thompson holds, and held at the time of the trial of this case, a negative opinion about the defendant Joseph Conforte", none the less decided that, on the entire record, this "negative opinion" did not amount to actual bias and prejudice within 28 U. S. C. §455(b) (App. D1). From this it followed (App.

A51-A56) that petitioners' waiver of their right to a jury trial was knowingly made.

The court below held that (App. A19), on the whole record, "nothing in Judge Thompson's remarks indicates a disqualification to hear the case", and, further (App. A20), that "Appellants' waiver of a jury trial was knowing and intelligent and was therefore valid."

4. With respect to the contention that petitioners were free to raise their objections on the ground of bias and prejudice on appeal, the court below held (App. A15-A16) that petitioners' motion for new trial was untimely because the assertedly new evidence could with diligence have been discovered earlier. The court below went on to hold (App. A14-A16) that grounds for recusal cannot be raised for the first time on appeal.

REASONS FOR GRANTING THE WRIT.

If we start with the basic premise that "justice must satisfy the appearance of justice" (*Offutt v. United States*, 348 U. S. 11, 14), then this is indeed a deeply disturbing case.

For, granting that Judge Thompson acquitted petitioners on six of the ten counts in the indictment, that in other proceedings he had ruled favorably to petitioner Joseph Conforte, and that significant portions of the sentences imposed on both petitioners by Judge Thompson were set aside by the court below because illegal, a profoundly troubling residue of demonstrable bias is still conspicuously apparent.

(a) Here, in the face of a finding (App. A46) of apparent bias on Judge Thompson's part, the Judicial Conference's Code of Judicial Conduct, which would have precluded waiver of that disqualification, was simply brushed aside. (b) Here both courts below erroneously assumed that a mere notice rejecting Joseph Conforte's membership in a bridge club charged him with notice of another and highly derogatory communication that admittedly he never saw. (c) Here the basic concept of "personal bias and prejudice" has been trivialized by being characterized as merely "negative feelings" (App. A46), "negative views" (App. A48), or "a negative opinion" (App. A53). (d) Here both courts below imposed a timeliness factor on 28 U. S. C. §455, in the face of the Congressional rejection of the Department of Justice's proposal that a timeliness provision be included in that section. And (e) this case emphasizes in sharp relief the ongoing conflict between circuits as to whether timeliness is indeed applicable under §455, conflict compounded into chaos in the court below, which has ruled both ways on the point, not only in this case but also in another, and then declined to clarify its divergences.

First. Judge Ferguson, ruling on the motion for a new trial based on Judge Thompson's asserted bias and prejudice, found as a fact (App. A46) that the latter's expressions "do raise reasonable doubts about his impartiality and do create at least an appearance of some bias against the defendant." This, without question, is a finding of apparent bias and prejudice under 28 U. S. C. §455(a) (App. D1), which under §455(e) (*ibid.*) can only be waived if there has been "a full disclosure on the record".

The Judicial Conference's Code of Judicial Conduct, however, states that "to the extent that any part of the enumerated statutes or Conference action is less restrictive than the Code, the latter will control" (69 F. R. D. 273; App. D3), and since 1975 that Code's Canon 3 has been revised so that "a remittal of disqualification is not permitted under any circumstances" (69 F. R. D. 279; App. D3). Judge Ferguson held, however, that the Code of Judicial Conduct did not impose a mandatory duty, and also that the Code could not be invoked after petitioners' convictions (App. A49-A50). The court below did not even deign to mention the Code.[3]

If the Judicial Conference's Code of Judicial Conduct, under which Canon 3 is silent about timeliness, is to be given effect according to its terms, it follows that the apparent bias and prejudice found by the trier of facts cannot be waived. On that footing, the judgment below must be reversed without more, rendering it unnecessary to consider

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[3]In *Bradley v. Milliken*, 620 F.2d 1143, 1157-58, the Sixth Circuit considered the applicability of Canon 3 A(4) of the Code of Judicial Conduct, and concluded that its provisions had not been violated. While this treatment differs diametrically from that accorded to the Code of Judicial Conduct by Judge Ferguson and the Ninth Circuit in the present case, we are not prepared to assert that the resultant difference in approach is fully equivalent to the conflict of decision envisioned by this Court's Rule 17.1(a).

any other question raised by the present petition. Consequently the first, and, it may be, the controlling issue in this case concerns the effect to be given the Code of Judicial Conduct in litigation.

The rulings below amount to holding that the Code of Judicial Conduct is no more to be regarded, or respected, than the usual postprandial bar association effusion, sweet-scented, high-sounding, but without the slightest operative effect in a harsh world inhabited by real people, and that accordingly it may not be invoked by actual litigants. If that is indeed the weight properly to be given to the Code of Judicial Conduct, this Court should so state.

We think, however, that the Code has more force than was accorded to it below. Congress created the Judicial Conference, *inter alia*, to "advise * * * as to any matters in respect of which the administration of justice in the courts of the United States may be improved" (28 U. S. C. §331). Pursuant to that mandate, the Judicial Conference promulgated a Code of Judicial Conduct under which there can be no waiver once judicial disqualification appears (*supra*, p. 14). We think that the Judicial Conference meant what it said, and we submit that the courts are as much bound by its promulgations as an executive department is by its own published regulations. *E.g.*, *Service v. Dulles*, 354 U. S. 363.

If we are right, then the finding of apparent bias and prejudice on Judge Thompson's part cannot be waived, and hence becomes dispositive. We urge the Court to declare the controlling effect of the Code of Judicial Conduct, in terms that can never again be misunderstood.

Second. But even if we assume, contrary to the foregoing, that the less restrictive statutes control, then it is clear that apparent bias and prejudice under 28 U. S. C. §455(a) can

be waived if, as §455(e) declares, there has been "a full disclosure on the record of the basis for disqualification" (App. D1).

1. Plainly, no such full disclosure was made here; Judge Thompson's mention at the hearing on jury waiver of his knowledge of Joseph Conforte's prior criminal convictions, both of them more than 15 years back, was far from disclosing his own strong adverse view that "he was an undesirable character" (App. A35, note ....), that he was "not good for Reno" (App. A37), that he was "one who is in rackets, so to speak, * * * even though it was legally conducted" (Dep. 18-19), that "he was a man of bad moral character" (Dep. 5), and that (Dep. 40) "he has never done anything in the meantime to cause me to think that he had revised his activities or general approach to life."

All too clearly, there was no "full disclosure on the record", either of those sentiments, or of the ACBL letter, or of the cocktail party remarks. The two latter incidents were not known to counsel (App. A44, A45), whose advice on waiving or not waiving a jury would of course be controlling. It is likewise hardly disputed that Joseph Conforte never saw Judge Thompson's ACBL letter (App. A15, A45; *supra*, p. 11).

2. The pervasive error infecting the present proceedings was the assumption of both courts below that the letter notifying Joseph Conforte of his rejection for membership, which was signed by Judge Thompson in his representative capacity as president of the Reno unit, somehow put its recipient on notice of the plainly derogatory remarks that the writer had earlier made about him in his communication to the ACBL (App. A15, A45).

We think it would be impossible for anyone not a clairvoyant to infer, from the simple notification giving no rea-

sons that was made in a representative capacity, the actively hostile views that Judge Thompson actually entertained about Joseph Conforte and that he articulated in his letter to the ACBL.

The matter can easily be tested. Suppose a motion made under 28 U. S. C. §144 (App. D1-D2) to disqualify Judge Thompson in advance of trial had been made on the basis of the rejection letter; could the moving party possibly have contended with the slightest degree of success that the rejection letter established personal bias and prejudice? Obviously not; and if that motion had been heard by a judge other than Judge Thompson the latter's feelings as set forth in his ACBL letter could not possibly have been apparent to such other judge.

3. Nor is it possible to excuse Judge Thompson's failure to mention the cocktail party incident because of the (App. A48) "impossible task of recalling and reciting every incident or factual detail which might contribute to the overall impression of partiality."[10]

For, notwithstanding the comment in the foregoing footnote, Judge Ferguson significantly set aside Judge Thompson's complete *non mi ricordo* (IIIA Wigmore, *Evidence* (Chadbourn rev. 1970) §995, p. 933) concerning the cocktail party. Judge Ferguson's findings on that matter (App. A36-A37) show that he split the difference: He found it had actually happened, despite Judge Thompson's asserted total lack of memory about the incident; and he then rejected the testimony that Judge Thompson had said that Joseph Conforte "should be run out of town", even though Judge

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[10][Footnote in original] "Such a requirement would be completely unrealistic. Indeed, in the instant case it would have been impossible for Judge Thompson to disclose to the defendants the facts regarding his cocktail party statements because he did not, and does not now, have any memory of that conversation about Mr. Conforte."

Thompson's denial — "I have learned in law school that banishment was not the proper remedy" (Dep. 19) — falls somewhat short of being entirely persuasive.

4. The basic question is whether, all the facts considered, Judge Thompson in fact made "a full disclosure on the record" as required by §455(e) when he told petitioners as they sought to waive jury trial only that (App. A29, note; *supra*, pp. 9-10) he was aware of three of Joseph Conforte's prior brushes with the law, in one of which an acquittal resulted, but said nothing of his own deep personal animus against Joseph Conforte, animus that is reflected in his ACBL letter, in his cocktail party remarks that Judge Ferguson found him to have made, and, preeminently, in his deposition testimony (*supra*, pp. 8-9).

Plainly, Judge Thompson's apparent bias and prejudice was never waived in the manner required by §455(e).

Third. The foregoing fundamental error as to Joseph Conforte necessarily carries over to, and therefore vitiates, the conviction of his wife, petitioner Sally Conforte -- even though, as Judge Ferguson found (App. A26, note), "There is no evidence whatsoever that Judge Thompson had any preconceived personal opinion about or bias against Mrs. Conforte."

For the law is clear that, when a U. S. District Judge improperly fails to recuse himself for personal bias and prejudice against some defendants being jointly tried, the resultant convictions cannot be fractionalized so that they can be sustained against the others.

The controlling authority here is *Berger v. United States*, 255 U. S. 22. There the district judge, presiding over the trial of an Espionage Act indictment returned during the pendency of the First World War, was shown to have had a deep-seated bias against all Germans and all German-

Americans. This affected defendant Germer, born in Germany; defendant Kruse, of immediate German extraction; and defendant Berger, born in Austria, which was allied with Germany and was by then at war with the United States. Their co-defendants were Engdahl, nativity not indicated but doubtless Scandinavian or Scandinavian-American; plus one, Irwin St. John Tucker, who very obviously was untouched by even the tiniest Teutonic taint. Yet Engdahl and Tucker had the benefit of the ruling that the judge had "a bent of mind that may prevent or impede impartiality of judgment" (255 U. S. at 33-34; see proceedings on remand, *Berger v. United States*, 275 Fed. 1021 [C. A. 7]).

Similarly here: If, as we urge, the judgment must be reversed for bias and prejudice against Joseph Conforte, that reversal would necessarily include the conviction of his wife, petitioner Sally Conforte, who was a co-defendant and was jointly tried with her husband.

Fourth. On the contention that there was actual bias and prejudice under 28 U. S. C. §455(b)(1) (App. D1), as to which even the statute permits no waiver, we think that this was clearly established by the totality of the feelings shown to have been entertained by Judge Thompson about Joseph Conforte; and we are also of the view that the courts below, by trivializing each single tree, erroneously denied the obvious existence of the forest.

1. Neither Judge Ferguson nor the court below undertook to suggest that the ACBL letter (*supra*, pp. 4-5) did not reflect personal bias and prejudice. Rather, both took the view that Joseph Conforte, upon receiving the membership rejection letter, should have known of the adverse views expressed about him by Judge Thompson in the earlier ACBL communication, admittedly never seen (App. A15, A45). We have already demonstrated the fallacy of that suggestion, especially in the light of what §144 would have

required (*supra*, p. 17); there is no need for repetition here.

2. The attempted distinction (App. A51-A56; cf. App. A18-A20) between bias that rests on matter learned by a judge sitting judicially and information obtained while off the bench, is, we submit, wholly unhelpful. The test is not the source of information, it is whether the judge's "bent of mind" (*Berger v. United States*, 255 U. S. at 33-34, *supra*) precludes impartiality. In undertaking that inquiry as to state of mind, the asserted dichotomy between "judicial" and "personal" is of little use, and indeed one circuit has expressly rejected it. *Rice v. McKenzie*, 581 F.2d 1114, 1117-18 (C. A. 4).

In the present case it is plain from the entire record that Judge Thompson's feelings towards Joseph Conforte were those of disapproval amounting to hostility. After all, both of the prior convictions repeatedly relied on by Judge Thompson were 15 or more years old — and Rule 609(b) of the Federal Rules of Evidence forbids the use, even to attack a witness's credibility, of convictions more than 10 years old.

Those feelings of hostility cannot be sugar-coated or euphemized away by being downgraded to "negative feelings" (App. A46), "negative views" (App. A48), or "a negative opinion" (App. A53). For, very plainly, when a judge's "negative" expressions are to the effect that a defendant whom he is about to try is "an undesirable character", is "not good for Reno", is a "person of bad moral character", and is "one who is in rackets, so to speak" (*supra*, pp. 5, 6, 8), then those "negative feelings" and "negative views" are identical with and quite indistinguishable from the "personal bias and prejudice" against which §455 protects.

3. The rulings below were also clearly wrong in refusing to hold that the excessive sentence imposed was not evidence of bias and prejudice.

We do not question Judge Ferguson's abstract proposition (App. A42) that "The severity of a sentence, if within the statutory limits, cannot support a claim of personal bias." But the court below set aside as illegal portions of the sentences imposed on both petitioners, thus necessarily holding that the sentences imposed were not within statutory limits.

Judge Thompson himself recognized (a) that the sentences imposed might be illegal (App. A32, note), and (b) that they were being imposed in an employment tax case because of his strong disagreement with petitioners as to the legality of their income tax returns (*ibid.*).

On deposition, Judge Thompson made it abundantly clear that he has always considered Joseph Conforte to be a bad man (*supra*, p. 8, 9). That deposition was taken on June 6, 1978; the sentences were imposed on October 28, 1977. Obviously, Judge Thompson's feelings in June 1978 are evidence of how he had felt less than eight months earlier (II Wigmore, *Evidence* [Chadbourn rev. 1979] §396, pp. 439, 442).

The savage 20-year sentence imposed on Joseph Conforte here, which was properly held below to have been illegal, thus constitutes convincing evidence of Judge Thompson's personal bias and prejudice. Cf. *United States v. Thompson*, 483 F.2d 527, 529 (C. A. 3). Indeed, the obvious relationship between Judge Thompson's hostile feelings and the imposition of sentences that he himself admitted (App. A32, note) "are unduly harsh and severe" seems to us so very plain that we feel justified in invoking Chief Justice Taft: "All others can see and understand this. How can we prop-

erly shut our minds to it?'' (*Child Labor Tax Case*, 259 U. S. 20, 37).

4. In the event that the issue of actual bias needs to be reached, we submit that this Court is free to make an independent examination of the undisputed facts: The bridge club letter, the cocktail party conversation as found by the trier of facts, Judge Thompson's remarks at sentencing, and his deposition testimony about his feelings towards Joseph Conforte.

The ''concurrent findings'' rule does not preclude such a course, for two reasons. First, that rule as generally phrased is invariably subject to a ''clearly erroneous''/ ''plainly without support'' exception; see the mass of cases collected in the *L. ed. Digest of Supreme Court Reports* at Appeal §1506; there is no need to cite even representative examples here. Second, this case is essentially an instance of facts intermingled with standards of law, where a different scope of review is appropriate. As the Court said in *Offutt v. United States*, 348 U. S. 11, 14:

> ''That great weight is to be given to the findings of fact by the two lower courts is a rule of wisdom in the exercise of the reviewing power of this Court. But in the enforcement of the rule it is important to discriminate between more or less subordinate facts leading to a judgment of their legal significance, and a conclusion — though concurred in by two courts — that may in fact imply a standard of law on which judgment on the case in its entirety is based. *Baumgartner v. United States*, 322 U. S. 665, 670-671; *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 403-404.''

The present case with its need to weigh judicial conduct is in that respect precisely on all fours with that of *Offutt*.

Fifth. The ruling below as to untimeliness is contrary to those in three other circuits, and is moreover demonstrably at variance with the intention of Congress in enacting 28 U. S. C. §455.

When the Department of Justice reported on the bill that became §455, it said (H. R. Rep. No. 93-1453, 93d Cong., 2d sess., p. 9; 3 U. S. Code Cong. & Ad. News [1974] 6351, 6358):

> "S. 1064 represents a salutary advance in the development of the administration of justice. However, consideration should be given to adding a provision such as is embodied in 28 U. S. C. 144 to assure that applications for disqualification shall be timely made so as to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before."

With that communication and the terms of 28 U. S. C. §144 before it, Congress enacted 28 U. S. C. §455 without any time limit of any kind. Accordingly, the Seventh Circuit held that disqualification could be enforced at any time, in that instance by mandamus (*SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117). The Sixth Circuit similarly holds that the matter can be raised on appeal (*United States v. Amerine*, 411 F.2d 1130). And the Fifth Circuit has at least three rulings to the same effect in varying factual settings. See *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, cert. den., 425 U. S. 944; *United States v. Brown*, 539 F.2d 467; *Potashnik v. Port City Const. Co.*, 609 F.2d 1101.

Contrariwise, the Second Circuit in an extreme case on the facts imposed the §144 time limit (*In re International Business Machines Corp.*, 618 F.2d 923), while further confusion appears in a Third Circuit decision, *United States v. Schreiber*, 599 F.2d 534, cert. den., 444 U. S. 843,

which suggests that contentions under §455 must qualify as "plain error" to receive appellate consideration.

The court below first followed the majority view in the present case when, after the appeals from conviction had been perfected, it remanded the cause to Judge Ferguson to hear and determine the contentions made in petitioners' motion for new trial.

Consistent with that determination, the court below on March 3, 1980, specifically declared in *United States v. Sibla* that §455 could be invoked even on appeal (App. C5). But, on April 28, it amended its *Sibla* opinion to strike that passage (App. C5 and note 2), and then, on the very next day, held in the present case that §455 was not available except under the conditions imposed on motions for new trial alleging newly discovered evidence relating to guilt or innocence (App. A14-A15).

Mindful of the need for a court of appeals to resolve its own intra-circuit conflicts, see *Wisniewski v. United States*, 353 U. S. 901, petitioners coupled with their petition for rehearing below a suggestion for rehearing in banc. But the opportunity thus proffered for elucidation of the contradictions just noted was declined. (App. B1).

The legislative history of §455 makes it abundantly clear that the later expressions of the court below in this case and in *Sibla* as amended were wrong, and that the Fifth, Sixth, and Seventh Circuits were right. The terms of §455 plainly show that Congress never intended to impose a timetable on any accused's "right to have an impartial judge" (*Tumey v. Ohio*, 273 U. S. 510, 535). To the contrary — and here we return to our starting point — Congress legislated to give effect to the immutable fundamental that "justice must satisfy the appearance of justice" (*Offutt v. United States*, 348 U. S. 11, 14).

CONCLUSION.

The question of the effect if any to be given the Code of Judicial Conduct in cases of asserted judicial disqualification, and the conflicting and confused state of the authorities as to the timeliness of proceedings invoking 28 U. S. C. §455 in such cases, urgently call for resolution by this Court. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Of Counsel

Dated: SEPTEMBER 1980

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A.D. 1980.